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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-565

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS

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JURISDICTIONAL STATEMENT

Central Hudson Gas and Electric Corporation, the appellant, appeals from the final judgment of the Court of Appeals of the State of New York, entered July 9, 1979, denying rehearing of a judgment entered May 1, 1979 which affirmed judgments of the Appellate Division, Third Department, and the New York Supreme Court, Albany County, and upheld the federal constitutionality of the Public Service Law of New York State as construed and applied by the Public Service Commission of the State of New York in its orders of February 25, 1977 and July 14, 1977 prohibiting electric utility companies subject to the Commission's jurisdiction from promoting the use of electrical energy by advertising. These orders are companions of the order challenged in *Consolidated Edison Co.* v *Public Service Commission* (No. 79-134), probable jurisdiction noted October 1, 1979. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial federal constitutional questions are presented.

Opinions Below

The opinion of the Court of Appeals of the State of New York is reported in 47 NY 2d 94, 417 NYS 2d 30, and is ap-

pended hereto as Appendix A. The opinion of the Appellate Division, Third Department, is reported in 63 AD 2d 364, 407 NYS 2d 735, and is appended hereto as Appendix B. The opinion of the New York Supreme Court is not reported and is appended hereto as Appendix C. The three opinions of the Public Service Commission are reported in 13 NY PSC 2072, 17 NY PSC 1-R, and 17 NY PSC 17-R and are appended hereto as Appendices D-1, D-2, and D-3 respectively.

Jurisdiction

The appellant (hereinafter "Central Hudson") commenced this action, seeking review of and declaratory relief against the Commission's orders of February 25 and July 14, 1977 under Article 78 of the New York Civil Practice Law and Rules, on November 10, 1977 in the Supreme Court, Albany County. As it had before the Public Service Commission (hereinafter the "Commission"), Central Hudson challenged the order banning promotional advertising as in violation of the First and Fourteenth Amendments to the United States Constitution.[1] The New York Supreme Court rejected Central Hudson's constitutional contentions, affirmed the validity of the Commission's orders, and denied the relief sought. The Appellate Division, Third Department, on July 27, 1978, affirmed the judgment below, and rejected appellant's attacks on the orders as unauthorized by statute and invalid under the federal and state constitutions.

The judgment of the Court of Appeals, rejecting all of appellant's statutory and constitutional contentions and affirming the judgment below, was entered May 1, 1979 (Appendix F-1). Appellant's motion for reargument was timely filed on May 30, 1979, and was denied on July 9, 1979 (Appendix F-2). Appellant's Notice of Appeal to this Court was filed with the Court of Appeals and the New York Supreme Court on August 22, 1979 (Appendix G). This Court's jurisdiction to review the judgment

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[1] The petition to the New York Supreme Court is appended hereto as Appendix E. It also challenged the validity of the order under the state constitution, and other features of the Commission's order not involved in this appeal.

of the Court of Appeals is conferred by 28 U.S.C. §1257 (2). The following cases, *inter alia*, sustain this Court's jurisdiction on appeal: *Williams* v *Bruffy*, 96 US 176, 183; *Live Oak Ass'n.* v *Railroad Commission*, 269 US 354; *Lake Erie & Western R. Co.* v *Public Utilities Commission*, 249 US 422; *Hamilton* v *Regents*, 293 US 245; *Atchison R. Co.* v *Public Utilities Commission*, 346 US 346, 348-49; *Lathrop* v *Donohue*, 367 US 820, 825.

Statutes Involved

The Public Service Commission's initial order banning promotional advertising by electric utility companies, issued December 5, 1973, provides, in pertinent part (App. D-1, p 31a):

> All electric corporations are hereby prohibited from promoting the use of electricity through the use of advertising. . . .[2]

This order was continued in effect by the Commission's orders of February 25 and July 14, 1977, as set forth in Appendices D-2 and D-3, and it is these continuing orders which are challenged in this appeal. The relevant provisions of the New York Public Service Law, held by the Court of Appeals to authorize the promulgation of these orders by the Commission, are set forth in Appendix H.

Questions Presented

The Court of Appeals of New York State rejected appellant's contentions that the Public Service Law gives the Public Service Commission no authority to issue the orders here in question and that the orders are in violation of the First and Fourteenth Amendments to the Constitution of the United States. The questions presented are:

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[2] The remainder of the order treats with promotion of the use of electricity through subsidy payments and employee incentives. Central Hudson is not here contesting the Commission's authority to prohibit such subsidy payments or employee incentives.

Despite the fact that the document establishing the ban is captioned "Notice of Proposal to Issue Order Restricting Certain Uses of Electrical Energy", the portion which referred to the ban on promotional advertising by electric utilities is a final order.

(1) Whether the Public Service Law, as so construed by the Court of Appeals and as applied in this case by the Public Service Commission, and the Commission's orders banning advertising by electric utility companies, facially or as applied to appellant, are in violation of the First Amendment, as made applicable to the States by the Fourteenth Amendment; and

(2) Whether the Public Service Law, as so construed and applied, and the Public Service Commission's orders, facially or as applied, are in violation of the Equal Protection clause of the Fourteenth Amendment.

Statement of the Case

The New York Public Service Commission's initial order banning "promotional advertising" by electric utility companies,[3] was issued in December, 1973, at the height of the oil supply constraint consequent upon the Arab oil embargo following the October 1973 Arab-Israeli conflict, and was based on the Commission's conclusion that the electric utility system in New York State "does not have sufficient fuel stocks or sources of supply to continue furnishing all customer demands for the 1973-74 winter." (App. D-1, p 26a).[4] At about the same time the Commission ordered a state-wide voltage reduction (13 NY PSC 2183). The latter order was rescinded on March 29, 1974 after the Arab

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[3] In 1970 and 1971 the Commission had banned promotional advertising respectively by telephone and gas companies, at a time when lack of telephone capacity and natural gas supplies jeopardized continuing service to existing customers. On June 21, 1972 the Commission declined to impose a similar advertising prohibition on electric utilities (12 NY PSC 108-R). The ban on telephone company advertising was lifted in March, 1973 (13 NY PSC 461). The ban on gas promotional advertising has recently been lifted for some but not all gas utilities due to the recent increased availability of natural gas.

[4] The validity of the Commission's original ban of December, 1973 on promotional advertising is not in question on this appeal. At the time of its issuance there was real doubt that fuel supplies would remain sufficient even to maintain existing service, and there was no reason for Central Hudson to contemplate promotional advertising.

oil embargo had been lifted, and upon a finding that New York electric utilities had "substantial inventories" of fuel (14 NY PSC 551); the advertising ban, however, remained in effect.

Opposition to continuance of the ban was publicly voiced, and on July 28, 1976 the Commission issued a "Notice of Proposed Policy Statement and Request for Comments on Advertising by Public Utilities and Electric Promotion Practices" (the pertinent provisions of which are appended hereto as Appendix I). Numerous written comments were received, including Central Hudson's letter of September 10, 1976 (R. 111-13),[5] urging that the ban be lifted on grounds both of policy and of constitutional law as then recently determined in *Va. Pharmacy Bd.* v *Va. Consumer Council*, 425 US 748 (1976). No evidentiary hearing or adversary process was given, despite requests to that effect by the Attorney General and the Consumer Protection Board of New York State (R. 645 and 502).

On February 25, 1977, the Commission issued its "Statement of Policy on Advertising and Promotional Practices of Public Utilities" (App. D-2, p 32a), directing that "the existing ban on promotion of electricity sales shall be continued". There was no evidence before the Commission of any shortage of fuel oil or electrical capacity; the Commission relied primarily on its conclusion that (App. D-2, p 37a) increased use of electrical energy "would aggravate the nation's already unacceptably high level of dependence on foreign sources of supply and would, in addition, frustrate rather than encourage conservation efforts". Dr. Alfred E. Kahn, the then Commission Chairman, concurring "with the greatest reluctance and distaste", relied also on the ground that promotion of electricity usage would cause an increase in peak consumption which, under the existing rate structure, "is artificially subsidized." (App. D-2, p 51a).

On March 28, 1977 Central Hudson petitioned the Commission for a rehearing. This and other such petitions were denied by the Commission in an opinion and order issued July 14, 1977 (App. D-3). The Commission relied primarily on the ground previously voiced by Chairman Kahn, i.e. that the existing "im-

[5] References to the record before the New York Court of Appeals are designated "R."

perfectly structured electric rates" do not "fully reflect the much higher marginal costs of on-peak consumption", and that: "The promotion of electric consumption at rates that do not reflect the costs of it to society is not the kind of commercial speech contemplated by *Virginia Board of Pharmacy*." (App. D-3, p 58a).

Thereafter, Central Hudson commenced the present action, as described above.[6] In the New York Supreme Court, the ban on promotional advertising was upheld solely on the ground (originally set forth by Chairman Kahn) that "because of inefficient rate structure" increased peak usage of electricity would not be "properly priced", and that therefore the ban "advances a significant public interest" sufficient to justify the incursion on First Amendment values (App. C, p 23a). Affirming, the Appellate Division, Third Department, cited, as establishing a "compelling" state interest in the ban, three matters relied on by the Commission, to wit: (1) increased use of electricity would cause "spiraling price increases due to the fact that present rates do not cover the marginal cost of new capacity"; (2) advertising "provides misleading signals" that energy conservation is unnecessary; and (3) additional usage will "increase the level of dependence on foreign sources of fuel oil." (App. B, p 19a).

On appeal, the Court of Appeals rejected Central Hudson's threshold challenge to the statutory authority of the Commission (which had also been raised below), ruling (App. A, pp 3a-7a) that "the legislature has conferred vast power upon the Public

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[6] In the New York courts, Central Hudson challenged other features of the Commission's order of February 25, 1977, including the prohibition on the use of bill inserts for the discussion of "controversial matters of public policy", presently challenged in this Court in *Consolidated Edison Co.* v. *Public Service Commission* (No. 79-134). These other questions are not involved in Central Hudson's present appeal.

This appeal raises no question with respect to payment for the costs of promotional advertising. The Commission's ban applies regardless of how the costs of promotional advertising are allocated. Pursuant to Section 113(b)(5) of the Public Utility Regulatory Policies Act of 1978, 42 U.S.C. §2623(b)(5), a Federal standard is established, for consideration by state regulatory bodies, requiring that the costs of promotional advertising be borne by the shareholders or other owners.

Service Commission", including "general supervision" of electric utilities, and the duty "to encourage . . . the preservation of environmental values and the conservation of natural resources." The prohibition of promotional advertising was held to be a "reasonable measure" to "prevent wasteful consumption or unneeded expansion of utility services."

Turning to the First Amendment issue, the Court of Appeals acknowledged (App. A, p 10a) that the Commission's ban "works a direct curtailment of expressional activity: an entire category of speech is prohibited because of its potential impact upon the society", and that such regulations "have been subjected to an exacting standard of review, the precise level of that standard being determined by reference to the nature of the communication." However, relying principally on *Ohralik* v *Ohio State Bar Ass'n.*, 436 US 447, the Court of Appeals ruled that (App. A, p 13a) "the ban on promotional advertising of electricity is consistent with First Amendment strictures".

In support of this conclusion the Court of Appeals first cited the "extensive government regulation" to which public utilities are generally subjected, and then concluded that since there is no "competitive shopping" for electricity on the basis of price, because the rates are fixed by the Commission, promotional advertising conveys no information of value to the recipient. Furthermore, in view of "the present energy crisis" (of which the Court took judicial notice), such communications might be "affirmatively detrimental" and "exacerbate the crisis". This hazard, said the Court, "constitutes a compelling justification for the ban".

Central Hudson's motion for reargument was denied without opinion.

This Court has Jurisdiction of this Appeal

The Court of Appeals of the State of New York is the highest Court of the State and its judgment against appellant is final. *Board of Commissioners* v *Lucas*, 93 US 108. The Public Service Law is a statute of New York State, and the Commission's order is a "statute of any state" within the meaning of

28 U.S.C. §1257(2). *Lake Erie & Western R. Co.* v *Public Utilities Commission,* 249 US 422, and other cases cited *supra* p 3. Central Hudson's petition in the Supreme Court, Albany County, explicitly draws in question the validity of the Commission's order, banning promotional advertising by electric utilities, under the First and Fourteenth Amendments to the United States Constitution (App. E, p 70a). In the Court of Appeals, Central Hudson argued (Br. 2, 17) that if the Public Service Law were construed to authorize the Commission's orders, that law would, under these Amendments, be unconstitutional as so construed and applied. After the Court of Appeals had so construed the statute in its opinion and judgment, Central Hudson, in its petition for reargument, repeated the contention. The Court of Appeals held that the delegation of power to the Commission to issue the orders is constitutionally valid, and explicitly upheld the constitutional validity of the Commission's orders (App. A).

The Federal Questions are Substantial

Central Hudson contends that the Commission's order prohibiting all "promotional advertising"[7] by electric utilities is plainly unconstitutional under the principles repeatedly laid down by this Court in the *Virginia Pharmacy* case, *supra,* and its other recent decisions dealing with so-called "commercial speech." Making full allowance for the "commonsense differences" between commercial and other varieties of speech remarked in the *Virginia Pharmacy* case, 425 US at 771, *Bates* v *State Bar of Arizona,* 433 US 350 at 381, and *Friedman* v *Rogers,* —US—, 99 S. Ct. 887 at 894, there is no feature of the present case which renders the caveats voiced in those cases even remotely applicable. The Commission's order applies to speech which is entirely truthful, and lawful in all respects save under the order

[7] While the term employed by the Commission to describe the type of advertising which it has prohibited is "promotional advertising", this definition encompasses a broad range of informational activities, from those whose sole purpose is to increase existing types of consumption, to those which inform customers of new or little known uses of electricity which they may find beneficial and which incidentally may increase the consumption of electricity. (See pp 20-1 *infra.*)

itself. The order bans speech which advocates no unlawful conduct, and is neither fraudulent, deceptive, obscene, libelous, nor provocative of violence. It bans speech unaccompanied by any action other than that inherent in the utterance itself. The order is not a regulation of "time, place and manner"; its limits are fixed exclusively by the content of the speech and, given the prohibited content, the ban is absolute and all-inclusive. Furthermore, as we will show, it bans speech which does much more than propose a commercial transaction.

However, in this case (for the first time in this Court) protection for commercial speech is invoked by a regulated public utility corporation. We believe that it is primarily this circumstance which, despite the teaching of *First National Bank of Boston* v *Belotti*, 435 US 765, has led the New York state courts into grievous error in their disposition of the constitutional issues in the present case. The circumstance that Central Hudson has a rate-regulated monopoly in the sale of *electrical* energy in its operational area caused the Court of Appeals to infer, quite wrongly, that Central Hudson's advertising could have no "beneficial informative content", and its right to First Amendment protection was therefore at the "nadir" (App. A, pp 12a-13a). In fact, for the supplying of heat and power, electric energy is in sharp (and so far unsuccessful) competition with both oil and natural gas, and price is one, but by no means the only, factor involved in this competition.[8]

Central Hudson asserts, therefore, that its promotional speech is entitled to substantial protection under the First Amendment, and that the relation between its advertising and the present energy crisis is so tenuous and quantitatively insignificant that

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[8] In this connection, we invite the Court's attention to District Judge Pratt's opinion in *Long Island Lighting Co.* v *Public Service Commission*,—F. Supp—(E.D.N.Y., Docket No. 77C972, March 30, 1979), holding the Commission's promotional advertising ban unconstitutional under the First Amendment. Relevant portions of the opinion in that case, which is now pending in the Court of Appeals for the Second Circuit, are appended hereto as Appendix J.

the State's interest is wholly insufficient to justify the ban.[9] We further assert that, since the Public Service Law of New York confers wholly different types of authority on the Commission, and makes no reference to limitations on utility companies' speech or anything comparable, the construction placed on the statute by the Court of Appeals has resulted in a delegation to the Commission which is wholly lacking in guiding standards, and therefore unconstitutional as both vague and overbroad.[10] We contend, finally, that in the light of the conservation goals on which the Court of Appeals primarily relied, the Public Service Law as construed and as applied here by the promotional advertising ban, which affects only electric utilities and not their far more successful competitors in the supply of heat, is a violation of the equal protection clause of the Fourteenth Amendment.

1. *Central Hudson's First Amendment Right to Engage in Commercial Advertising is Not Destroyed by Its Status as a Regulated Public Utility Corporation.* In the *Belotti* case, *supra*, the Massachusetts statute severely limited the right of numerous specified types of corporations (including banks, public utilities,[11] and business corporations) to spend money in order to influence elections or referenda. Holding that the statutory restrictions were in violation of the First Amendment, the Court (per Powell, J.) observed (435 US at 775-76):

> The court below framed the principal question in this case as whether and to what extent corporations have First Amendment rights. We believe that the court posed the wrong question. The Constitution often protects interests broader than those of the party seeking their vindication. The First Amend-

[9] As we show below, the promotional advertising ban is unique to the State of New York. Neither the federal government nor any other state is imposing any such prohibition.

[10] As shown hereinafter, affirmance of the decision below would therefore work an enormous expansion into the speech field of the powers of the numerous state public utility commissions operating under statutes comparable to the New York Public Service Law.

[11] Appellants in the *Belotti* case included two banks and three business corporations, but no public utilities. However, there is nothing in the wording or logic of the Court's opinion to suggest that the ruling or opinion would have been different as applied to public utility corporations.

> ment, in particular, serves significant societal interests. The proper question therefore is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the statute] abridges expression that the First Amendment was meant to protect. We hold that it does.

The fact that the *Belotti* case concerned "political" and the present case "commercial" speech subtracts nothing from the force of the point made: that the test is not the identity of the communicator but the First Amendment interests of the communicants. Indeed, Justice White, dissenting (with Justices Brennan and Marshall), thought that the communicants' interests would have been greater had the speech been commercial-promotional (435 US at 807-8):

> I recognize that there may be certain communications undertaken by corporations which could not be restricted without impinging seriously upon the right to receive information. In the absence of advertising and similar promotional activities, for example, the ability of consumers to obtain information relating to products manufactured by corporations would be significantly impeded.

Accordingly, the emphasis laid by the New York court upon the "regulated and franchised" status of public utilities, as justifying restricting their right of speech, is misplaced, for these characteristics do not determine the communicant interests involved in utility advertising. Furthermore, just as the banks in the *Belotti* case were under "extensive government regulation" (App. A, p 13a), so were the pharmacists in the *Virginia Pharmacy* case (425 US 748, 750-51) and *Carey* v *Population Services*, 431 US 678, 701 (1977), as well as the lawyers in *Bates* v *State Bar of Arizona*, 433 US 350, 353 *et seq.* In all these cases the ban on advertising was invalidated.

Nor do the *Ohralik* case, 436 US 447, and other decisions noting "commonsense differences" between commercial and other speech, support the validity of the Commission's promotional ban, for none of the factors remarked or relied on in those cases are relevant to the present one. The *Virginia Pharmacy* case, 425

US at 771, referred to "deceptive or misleading" advertising, as did also the *Bates* case, 432 US at 383-84. The *Ohralik* case, 436 US 447, particularly relied on by the Court of Appeals (App. A, pp 12a-13a), and *In re Primus*, 436 US 412, both turned on the characteristics of in-person solicitation of a lawyer-client relation, and weighted the hazards of (436 US at 461): ". . . stirring up litigation, assertion of fraudulent claims, debasing the legal profession, and potential harm to the client in the form of overreaching, overcharging, underrepresentation, and misrepresentation." The decision in *Friedman* v *Rogers, supra*, 99 S. Ct. at 897, involved the allegedly deceptive and misleading use of optometrical trade names.

The Commission's ban on promotional advertising is not directed at any of these problems or hazards. It is a total ban on all such advertising, regardless of its character, quality, style, or purpose.

The remaining argument presented in the New York Court's opinion (App. A, p 13a), for reducing Central Hudson's First Amendment rights to the "nadir", is that Central Hudson operates in a "noncompetitive market" wherein, due to rate regulation, "the price of electricity simply may not be reduced by competitive shopping". This point has not arisen in any of the Court's prior commercial speech cases. The legal merits of the argument, we believe, need not be pursued, because it rests upon a wholly mistaken view of the market in which Central Hudson operates and with which the Commission is concerned.

It is true, of course, that Central Hudson is the sole distributor of electrical energy in its operational area, and that the price is fixed by the Commission. But, in the market sense, customers do not buy electrical energy for its own sake, but for its use as heat, light, and power. And while electrical energy does furnish virtually all light, it is in intense competition with other forms of energy in supplying heat and power.[12] Furthermore, it is apparent

[12] Of total end use energy consumption estimated for 1978 in New York State, electric energy only represents 11.5%. Petroleum products, used primarily for heating and transportation, account for 67.5%, natural gas, used primarily for cooking and heating accounts for 18.3%, and the remaining 2.7% represents other sources of energy. See *Draft Report, New York State Master Energy Plan*, New York State Energy Office, August 1979, Figure IV-14.

from the Commission's two opinions continuing in effect the promotional ban (Apps. D-2, D-3), that the Commission was primarily concerned with the use of electricity for space and water heating and air conditioning.

In the market for space and water heating, there is intense competition between electricity, natural gas (which Central Hudson also distributes), and house heating oil. Electricity has the smallest share of the three, and electricity and natural gas together have less than one-quarter of the market.[13] Each of the three rival energy sources has comparative advantages and disadvantages, in terms of both price and quality. The significance of all this for First Amendment purposes was well described by Judge Pratt in the *Long Island Lighting* case (App. J, pp 92a-93a):

> Beyond LILCO's economic interest is the public's interest in the free flow of information on the use of electrical energy for home heating. The consumer has a substantial interest in receiving truthful information on electric space heating. Not only does promotional advertising provide information of general public interest concerning electrical energy, it also affects an individual's economic decisions on the benefits and detriments of electric heat. Choosing among oil, gas, or electric residential heating may significantly affect his budget and daily comfort. Moreover, the public in general has an interest in receiving information on the various methods of heating, in order to utilize energy sources ecologically and efficiently.[14]

Furthermore, there are innovative applications of electrical energy for space heating, such as heat pumps, and with advancing technology, self-generating energy sources such as private hydro, solar, and windmill systems, for which electricity is the

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[13] In 1978 in Central Hudson's service territory, residential heating was 9.3% electric, 12.4% gas, and 78.3% oil. See Central Hudson's Annual Report for the Year Ended December 31, 1978 to the Public Service Commission. Natural gas distribution facilities are available in Central Hudson's service territory only in and adjacent to cities. Consequently due to the predominately non-urban character of Central Hudson's service territory, a majority of customers only have the choice between oil or electricity for heating.

[14] See also comparable portions of Chairman Kahn's separate opinion (App. D-2, pp 49a-51a).

most appropriate supplement or back-up, are becoming practical. Central Hudson is well informed on these subjects, and if what it has to say may be affected by self-interest, that in no way limits its right to speak. See *Eastern R.R. Presidents' Conference* v *Noerr Motors Freight,* 365 US 127, at 139: "Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act." So must individuals. Whether or not Central Hudson's voice is heeded, it is entitled under the First Amendment to be heard, and its stifling by the Commission's order cannot be justified by the fact that the voice is that of a public utility corporation.

2. *The State Interests Asserted by the Commission and the New York Courts are Insufficient to Justify the Suppression Accomplished by the Commission's Order.* Although the Public Service Commission and the lower New York courts relied on three separate reasons to support the promotional ban, the Court of Appeals wholly ignored two of them, and we believe they merit no consideration in this Court.[15] The sole state interest relied on by the Court of Appeals was described as follows (App. A, pp 13a-14a):

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[15] One of these contentions is based on the "marginal cost" principle, i.e. that since utility companies use their most economical sources first, and the less efficient only as increased demand requires, the unit costs are highest during peak demand periods. A rate system based on average cost does not reflect this factor, and results in off-peak users subsidizing on-peak users. (See App. D-2, pp 50a-52a, and D-3, pp 57a-59a.) Seasonal and time-of-day differential rates mitigate the inequity, if such it is. The problem exists irrespective of the possible effect of promotional advertising, and is aggravated by any rise in demand, regardless of its cause. The Commission has ample power to deal with the matter through its rate-making authority. *Matter of New York State Council of Retail Merchants* v *Public Service Commission,* 45 NY 2d 661, 412 NYS 2d 358 (1978).

The other argument is that promotional advertising "provides misleading signals that conservation is unnecessary" (App. B, p 19a, and D-3, p 57a). The notion is not that the content of such advertising is misleading, but that the public will draw an incorrect inference from the fact of the advertisement. Like contentions were summarily rejected by this Court in the *Virginia Pharmacy* case, 425 US at 769-70 and 773; the *Bates* case, 435 US at 374-75; and *Linmark Associates* v *Willingboro,* 431 US 85, at 96-97.

> It would not strain the bounds of judicial notice for us to take cognizance of the present energy crisis. Conserving diminishing resources is a matter of vital state concern and increased use of electrical energy is inimical to our interests. Promotional advertising, if permitted, would only serve to exacerbate the crisis. In short, this constitutes a compelling justification for the ban.

Assuredly, oil conservation is a most important national policy, but the question remains whether or not the promotional advertising ban will measurably contribute to its fulfillment. The Commission itself made but a faintly affirmative claim (App. D-2, p 37a), acknowledging that the promotional ban "may aptly be described as piecemeal conservationism since promotion of oil for use in heating or internal combustion applications is not similarly proscribed", and that the ban "will be less than optimally effective, in a national context", while lamely concluding that it "will result in some dampening of unneccessary growth so that society's total energy requirements will be somewhat lower than they would have been had electric utilities been allowed to promote sales."

Now, if this were a case such as *Wickard* v *Filburn*, 317 US 111, in which a general and nationwide prohibition is enforced against persons whose individual impact on the problem is negligible, on the basis that the impact of many such persons is substantial, the New York regulation, whether or not constitutional, might be rationally related to its avowed aim. But the present case is not in that posture, for *no other state is imposing a similar ban*. In no state save Oklahoma has a like prohibition ever been imposed—even in 1973 at the time of the Arab oil embargo—and in Oklahoma the promotional advertising ban was held invalid as "arbitrary". *State* v *Oklahoma Gas & Electric Co.*, 536 P2d 887, 895 (Okla. 1975).[16]

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[16] In Nebraska, where electric utilities are publicly owned, a promotional advertising ban for other privately owned utilities was considered, but discarded after the State Attorney General ruled that such a ban would be unconstitutional as an impairment of freedom of speech. Neb. Op. Att'y Gen. No. 8 (1979).

Furthermore, the "present energy crisis" of which the New York court took notice, is a national problem dealt with primarily by policies fixed at the national level. Federal energy policies do not prohibit promotional advertising by electric utilities, and by plain implication recognize their legitimacy. Section 113(b)(5) of the Public Utility Regulatory Policies Act of 1978, 42 U.S.C. §2623(b)(5), provides: "No electric utility may recover from any person other than the shareholders (or other owners) of such utility any direct or indirect expenditure by such utility for promotional or political advertising . . ." The incompatibility of this provision with prohibition of promotional advertising is confirmed in the Report of the Joint Conference Committee, which explicitly states that no prohibition of either promotional or political advertising by electric utilites was intended.[17]

Thus the Commission's concern for the effect of electric utility advertising on the energy crisis is shared neither by the federal nor the other state governments. Given these circumstances, together with the freedom of Central Hudson's oil furnace competitors to cry their wares, and the public tolerance of flashy television advertisements for powerful cars and potent gasoline, inviting consumer spending for services far less necessary than home heating, it is nothing short of ludicrous to describe the Commission's order as serving any substantial, let alone compelling, state interest in terms of oil conservation.

3. *The Order, and the Public Service Law as Construed and Applied by the New York Courts, are Unconstitutional for Vagueness, Overbreadth, and Lack of Standards.* The provisions of the New York Public Service Law (McKinney 1955; Supp. 1978) (App. G) empowering the Public Service Commission to regulate electric utility companies closely resemble those of at least 28

[17] Pertinent extracts from the United States Congressional Committee Reports relating to Section 113(b)(5) of the Public Utility Regulatory Policies Act of 1978 and its predecessor bill are appended hereto as Appendix K.

jurisdictions, including the District of Columbia.[18] The Commission is given (Section 4, subd. 1) "all powers necessary or proper to enable it to carry out the purposes" of the Law; it is directed (Section 5, subd. 2, added in 1970) to "encourage" the companies subject to its jurisdiction to plan and carry out their functions

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[18] The approximately 48 states which regulate investor owned electric utilities grant their respective public utility regulatory bodies general supervisory powers over such utilities. In addition, the following 28 statutes grant their public utility regulatory bodies implied powers similar to the "powers necessary and proper" confered upon the Commission by New York Public Service Law §4, subd. 1 (McKinney 1955) and upon which the New York Court of Appeals based its determination that the Commission had authority to promulgate the ban on promotional advertising: Ala. Code tit. 37, §37-1-31 (1977); Alaska Stat. §42.05.151 (1978); Ariz. Rev. Stat. §40-202(a) (1974); Ark. Stat. Ann. §73-202 (1957); Cal. Public Utilities Code §701 (West 1975); Conn. Gen. Stat. Ann. §16-6b (West Supp. 1979); D. C. Code Encycl. §43-1003 (West 1968); Fla. Stat. Ann. §366.05 (West 1968); Idaho Code §61-501 (1976); Iowa Code Ann. §476.2 (West Supp. 1979); Kan. Stat. §66-101 (1972); La. Rev. Stat. Ann. §45:1164 (West 1979); Md. Ann. Code art. 78 §1 (Supp. 1978); Mich. Comp. Laws Ann. §460.6 (1967); Miss. Code Ann. §77-3-45 (1972); Mont. Rev. Codes Ann. §70-104 (Supp. 1977); N.M. Stat. Ann. §62-6-4 (1978); N.C. Gen. Stat. 62-30 (1975); N.D. Cent. Code §49-02-02(2) (1978); Okla. Stat. Ann. tit 17 §153 (West 1953); Or. Rev. Stat. §756.040(2) (1975); Pa. Cons. Stat. Ann. tit 66, §501-(b) (Purdon Supp. 1979); R.I. Gen. Laws §39-1-38 (1977); S.C. Code §58-27-150 (1977); Tex. Rev. Civ. Stat. Ann. art 1446(C) (Vernon Supp. 1978); Utah Code Ann. §54-4-1 (Supp. 1979); Wis. Stat. Ann. §196.02 (West 1957); and Wyo. Stat. §37-2-127 (1977).

While the Court of Appeals cited New York Public Service Law §5, subd. 2, which empowers the Commission to "encourage" conservation, in its discussion of the authority of the commission to issue the order, it is difficult to understand how a statute which authorizes a governmental body to "encourage" the companies it regulates adds substantively to its own powers. Statutes in at least five states empower their respective public utility regulatory bodies to consider or encourage conservation, in a manner analogous to New York Public Service Law §5, subd. 2 (McKinney Supp. 1978): Colo. Rev. Stat. §40-2-117 (Supp. 1978); Md. Ann. Code art. 78, §56 (Supp. 1978). Nev. Rev. Stat. §703.260(4) (1979); Ohio Rev. Code Ann. §4905.70 (Anderson Supp. 1978); and Pa. Cons. Stat. Ann. tit 66, §308 (Purdon Supp. 1979).

"with economy, efficiency, and care for the public safety, the preservation of environmental values and the conservation of natural resources"; it is endowed (Section 66, subd. 1) with "general supervision" of all electric corporations, and is empowered to order (Section 66, subd. 2) such "reasonable" service improvements "as will best promote the public interest, preserve the public health and protect" customers and employees, to prescribe uniform accounting methods (Section 66, subd. 4) and "just and reasonable rates" (Section 66, subd. 5) and to fulfill a variety of administrative and investigative duties ancillary to the specified substantive powers.

These are the provisions which the New York courts have now construed as authorizing the Commission to prohibit advertising by electric public utilities. The construction so placed on the New York Public Service Law is, of course, beyond the province of this Court to review, but the *fact* of the construction is directly relevant to the federal constitutionality of the Commission's orders, and of the Law itself as so construed and applied.

It is apparent that the Public Service Law sets forth no standard appropriate for or sufficient to sustain a delegation of authority to the Commission to determine what the companies subject to its jurisdiction may or may not say publicly. Standards such as "public interest" or "public welfare" are accepted as sufficient for rate and other economic legislation, but are wholly insufficient for prohibiting speech regulation. In *Hannegan* v *Esquire*, 327 US 146, the Postmaster General contended that a federal statute authorized him to suspend second class mailing permits for publications if he had determined that they did not contribute "positively' to the "public good or public welfare". This Court refused so to construe the statute, saying it would be tantamount to deciding whether a publication's contents were "good" or "bad", and added (327 US at 151): "To uphold the order of revocation would, therefore, grant the Postmaster General a power of censorship. Such a power is so abhorrent to our traditions that a purpose to grant it should not be lightly inferred."

This Court has emphasized that in the First Amendment area the "government may regulate . . . only with narrow specificity." *NAACP* v *Button*, 371 US 415, 433. Thus a delegation of power to regulate speech requires much more precise guiding standards than might pass muster in other areas. *Hynes* v *Borough of Oradell*, 425 US 610; *Coates* v *Cincinnati*, 402 US 611; *Keyishian* v *Board of Regents*, 385 US 589; *Lovell* v *Griffin*, 303 US 444. Otherwise such delegation would allow government officials "to pursue their personal predilections." *Smith* v *Goguen*, 415 US 566, 575.

The Court of Appeals has done nothing to narrow, by construction, the circumstances in or purposes for which the Commission may prohibit or otherwise limit speech. It relied on the "present energy crisis" as justifying the promotional advertising ban, but said nothing to suggest that other state interests might not support the promotional advertising ban or other speech limitations. The Commission and the lower New York courts relied on other factors, and their invocation of the "marginal cost" theory, by its logic, would justify a promotional advertising ban at any time the Commission deemed the rate structure incongruent with real costs. The Court of Appeals did not negate other justifications which might be put forward by the Commission for restricting the speech of companies subject to its jurisdiction.[19]

Apart from the lack of guiding standards in the authorizing legislation, the Commission's order itself suffers from both vagueness and overbreath. In part this is probably the consequence of the wholly insufficient evidentiary procedures and record on which the order is based. The Commission's initial order in 1973 was based on general information and inference concerning the effect of the Arab oil embargo on the supply of oil for electric generation (App. D-1). Although the factual situation

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[19] The New York courts' cavalier disregard of these questions of precision and authority may be compared with the thoughtful treatment of a comparable problem in the Supreme Court of Idaho's recent decision in *Washington Water Power Co.* v *Kootenai Environmental Alliance and Idaho Public Utilities Commission.* — Ida. —, 591 P. 2d 122, 128-9 (1979).

on which the order was based did not last beyond the spring of 1974, in 1977 the Commission continued the ban on the basis of comments received by mail. The suggestion of the State Attorney General and State Consumer Protection Board, that an evidentiary hearing be held, was disregarded. In the *Belotti* case, 435 US at 789, Justice Powell referred critically to the lack of any "record or legislative findings" in support of the challenged statute. In the present case, the legislature has never considered, much less acted upon the promotional advertising ban, and this, together with the lack of any evidentiary record made by the Commission, has basically flawed the decision-making process.

For whatever reason, the Commission's inclusive and unqualified order is fatally overbroad.[20] Although it is apparent from its opinions that the Commission was concerned primarily if not exclusively with space heating and cooling, it made no effort to confine its order to that area. For example, the order covers the use of electricity for lighting, which uses far less energy that what is required for heating and airconditioning, and which involves safety and human efficiency and productivity values. The order also applies to the use of electricity for power; it would prohibit Central Hudson from promotional advertising of electric vehicles, despite their energy economy and pollution-free performance. Furthermore, the order applies to the promotion of devices and methods for the use of electricity in ways which diminish the use of oil, as where electricity is used to power energy-efficient new devices such as the heat pump, or, in small quantities, to supplement solar or windmill heating systems.

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[20] We are mindful of the passage in the *Bates* opinion (433 US at 380-81) holding that the "overbreadth doctrine" does not apply to "professional advertising". But there the Court was discussing overbreadth in regard to its relaxation of the standing limitation, so that a party whose own conduct is not constitutionally protected is allowed to challenge a statute on the ground of its possible application to others whose conduct would be constitutionally protected. No standing problem is involved in the present case, since the Commission's ban is absolute, it applies directly to Central Hudson, and no assertion is made that Central Hudson has not observed its terms.

Furthermore, despite its all-inclusive coverage, the order is vague in that the contours of "promotional advertising" are foggy. Does it cover a consultation initiated by an officer of Central Hudson with an industrial concern on improved and expanded lighting? A speech by the president of Central Hudson to a businessmen's club describing various ways in which electricity can serve their needs? Would it be permissible for Central Hudson to launch a public attack on the wisdom of the Commission's order, when the most publicly effective means of attack would be to portray the diverse uses and other merits of electrical energy? Under the challenged order, the management of Central Hudson is continually faced with questions of this nature in which it must determine whether informational activities in which it wishes to engage are proscribed by the order or not. This, Central Hudson believes, improperly places a cloud over a matter which should be relatively unrestricted, namely the furnishing of truthful information to others about its business.

The result of the decision in the Court of Appeals is that the Commission has been allowed to exert prohibitory authority in the sensitive area of freedom of speech, although the New York legislature has never considered the conferring of such authority and there are no appropriate legislative guidelines for its exercise. Since comparable statutes prevail in a majority of the states, affirmance by this Court may well result in similar assertions of authority by state public utility commissions in many other states, and involve them in problems for which their traditional areas of expertise are wholly unsuited.[21] The lack of governing standards here is reflected in an unqualified order with no evidentiary basis, and thoughtlessly vague and overbroad.

4. *The Order and the Authorizing Statute are Unconstitutional under the Equal Protection Clause.* As the Commission

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[21] Cf. The view of the Supreme Court of Idaho in the *Washington Water Power* case, *supra,* addressed to the type of regulation at issue in the *Consolidated Edison* case now pending in this Court: "The subject matter of the Commission's order at issue here does not deal with the subject matter traditionally regulated by public utility commissions and does not fall into a category of regulation which requires the technical expertise of a commission as contrasted with a legislature." 591 P. 2d at 129.

itself recognized (App. D-2, p 37a), the promotional ban to which appellant is subject does not apply to Central Hudson's non-utility competitors, such as oil furnace and heating oil distributors. In the light of the purpose—i.e., oil conservation—on the basis of which the Court of Appeals sustained the order, we submit that the discrimination thus worked between electric utilities and their competitors is irrational, undermines the plausibility of the "compelling interest" so relied on by the Court of Appeals, and violates the equal protection clause of the Fourteenth Amendment.

It is true, of course, that oil furnace heating enterprises are not subject to the Commission's jurisdiction. But its lack of authority over these dealers is not constitutionally significant except to show that it is the state government as a whole, and not the Commission alone, which is responsible for the discrimination. The Court of Appeals has interpreted New York law as authorizing limitations on advertising by utilities but not by their competitors, and that is the discrimination here challenged.

The constitutional validity of the discrimination must be assessed in the light of the objective the order purports to advance. Since over three fourths of all residential heating in Central Hudson's service area is accomplished by individual oil furnaces, the exclusion of direct oil heating from a prohibition, the purpose of which is to limit the use of oil, is irrational on its face. The situation is an aggravated version of the one confronting this Court in the *Belotti* case, where (435 US at 793-95) the prohibition applied to banks, utilities, and business corporations but not to "entities or organized groups" with "resources comparable to those of large corporations." The discrimination caused Justice Powell, writing for the Court, to observe (435 US at 793): "Thus the exclusion of Massachusetts business trusts, labor unions, and other associations undermines the plausibility of the State's purported concern for the persons who happen to be shareholders in the banks and corporations covered [by the statute]."

This Court's decisions have long recognized a close relation between equal protection and freedom of speech in other cases where speech restrictions were applied in a discriminatory way. *Williams* v *Rhodes*, 393 US 23; *Cox* v *New Hampshire*, 312 US 569, 576; *Cox* v *Louisiana*, 379 US 536, 558. In the latter case

Justice Black, concurring separately in this portion of the decision, and speaking of a statute which prohibited obstruction of traffic while excepting labor union picketing from its scope, wrote (379 US at 581): "This seems to me to be censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments. And to deny this appellant and his group use of the streets because of their views against racial discrimination, while allowing other groups to use the streets to voice opinions on other subjects, also amounts, I think, to an invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment." See also *Erznoznik* v *City of Jacksonville*, 422 US 205, 215; Kalven, *The Concept of the Public Forum*, 1965 Sup. Ct. Rev. 1, 30.

A comparable situation, confronting the Court more recently, involved a Chicago ordinance which exempted peaceful labor picketing from a general prohibition of picketing within 150 feet of a school. *Police Department of Chicago* v *Mosley*, 408 US 92. Holding the ordinance unconstitutional, Justice Marshall wrote for the Court (408 US at 95-96):

> The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. * * * *
>
> Necessarily . . . under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.

It is plain from these and other cases that the equal protection standard of review is strict in cases such as the present one, where First Amendment impingements are involved. In the *Mosley* case, *supra*, the Court stated that (408 US at 101): "The Equal Protection Clause requires that statutes affecting First Amendment rights be narrowly tailored to their legitimate objectives." And in *San Antonio Ind. School Dist.* v *Rodriguez*, 411

US 1, the Court's opinion (per Powell, J.) referred approvingly to the *Mosley* case, saying (411 US at 34, n. 75): "The stricter standard of review was appropriately applied since the ordinance was one 'affecting First Amendment interests'." See also the comparable statements by the other Justices, 411 US at 61 (Stewart, J.), 63 (Brennan, J.), and 112-15 (Marshall, J.).

There is no rational, let alone compelling, interest to justify the discrimination here in question, and accordingly the Public Service Law as construed and the Commission's order, taken together, should be held invalid under the equal protection clause.

Conclusion

Appellant respectfully submits that the federal questions presented by this appeal are substantial and of public importance.

Respectfully submitted,

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